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No. 83-1019

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BARBARA J. WIED,

Petitioner

v.

VALHI, INC.,

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Delaware

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Mrs. Wied responds to Valhi's Brief by making the following five points:

I.

What is shocking but not surprising is Valhi's assertion that the Court should not grant the Petition because

*Petitioner will utilize for ease of reference and continuity the abbreviations she defined in the Petition she filed on December 20, 1983, and will refer to the material in the Appendix to the Petition as "A" followed by the appropriate page number. In addition, Petitioner will refer to the Brief of Respondent Valhi, Inc. in Opposition as "Valhi's Brief" followed by the appropriate page number.

there are no constitutional issues involved. Valhi's Brief at 3. To Valhi, all that Mrs. Wied did in the Delaware courts was complain "that Valhi allegedly failed to comply with Delaware Court of Chancery Rules 23 and 23.1, which concern the procedures governing class and stockholder derivative actions in the Delaware courts." *Idem.* Thus, Valhi lays bare its continued lack of recognition that these rules of procedure are founded upon the constitutional due process concepts of notice and adequacy of representation in order to protect the absent beneficiaries of such litigations from the very acts of despoliation faithless representatives might visit upon them.

It is these issues of notice and adequacy of representation which Mrs. Wied raised on August 31, 1979, in her first pleading, her Motion to Intervene. A59-A66. The Trial Court recognized the issues of notice and adequacy of representation when Mrs. Wied first raised them. *See* the letter opinions of October 22 and 30, 1979; A32 and A30-A31, respectively. Later, the Trial Court inexplicably "converted" the case in its mind to an individual action from the representative action it was and concluded that Valhi could sell its PSA shares to PSA without regard to the effect on the representative action. A19; A19-A20; Petition at 11-12.

If Valhi's point is that Mrs. Wied did not use the words "due process," the argument should not carry the day given the Court's long adherence starting with another Delaware case, i.e., *Crowell v. Randell,* 10 Pet. 368, 392 (1836), to the principle that there is no essential "particular form of words or phrases" which must surround the raising of a constitutional issue. *People of State of New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). *See also Street v. New York,* 394 U.S. 576, 584-85 (1969); *Braniff Airways v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 599 (1954); *Flournoy v. Wiener,* 321 U.S. 253, 264, 274

(1944); *and cf. Chambers v. Mississippi*, 410 U.S. 284, 289-90 and 308-09 (1973).

II.

Contrary to Valhi's claim (Valhi's Brief at 2-4), Mrs. Wied respectfully submits that the record shows that she timely raised the constitutional issues below. Once the Trial Court agreed with Mrs. Wied's attack on Valhi's failure to give notice and failure to conduct itself as an adequate representative plaintiff (*see* Mrs. Wied's Motion to Intervene at A59-A66 and the letter opinion of October 22, 1979, at A32), she had no reason to raise the due process point until the Delaware Supreme Court's surprising (and factually erroneous) finding that a PSA press release and information letter "constituted a complete disclosure . . . of Valhi's action and intentions." A11-A12. She thereupon raised the constitutional issue as her first point in her Motion for Reargument, etc. A35-A58, at A35-A36, paragraph 1; A36-A39, paragraphs 2-7, especially paragraph 7. The Court has recognized the propriety and timeliness of Mrs. Wied's action in comparable circumstances. *See, e.g., Bohannan v. Arizona ex rel. Smith*, 389 U.S. 1, 3-4 (1967); *Herndon v. State of Georgia*, 295 U.S. 441, 443-44 (1935); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *State of Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 281 U.S. 74, 79 (1930); and *Saunders v. Shaw*, 244 U.S. 317, 320 (1917).

III.

Valhi, while baldly asserting that every aspect of Mrs. Wied's demonstration of Valhi's faithlessness as the representative plaintiff "has been adjudicated as factu-

ally erroneous" (Valhi's Brief at 4), never addresses the undisputed key fact that while serving as the representative plaintiff and, indeed, at the very time Valhi on February 1, 1979, was again representing to the Court that it "will fairly and adequately protect the interests of the class," Valhi was negotiating the agreement to sell its PSA stock with a New York Stock Exchange value of $11,900,000 for an enormous profit of approximately $20,000,000 and to cooperate to dismiss the class claims with prejudice. A53-A55, paragraph 31, particularly paragraphs 31(2) and 31(6); Petition at 6-7 and 16. Contrary to Valhi's assertion, the Delaware Supreme Court did not once refer to the undisputed key fact of Valhi's deceit.

IV.

Valhi's references to other "adjudicated facts" (Valhi's Brief at 4-7) are equally without record support. Valhi's insistence that the Delaware Supreme Court was factually accurate that the press release and information letter "constituted a complete disclosure" (Valhi's Brief at 5) is completely at variance with the facts, since neither piece of paper disclosed either Valhi's profit or Valhi's agreement to cooperate to dismiss the class action with prejudice. Petition at 14; and *compare* A11-A12 with A50-A52, paragraph 29. Valhi's reliance on the Delaware Supreme Court's finding "that Valhi did nothing in this case which prejudiced any class action or derivative claims of PSA stockholders" (Valhi's Brief at 6, citing to A12) ignores the fact, as did the Delaware Supreme Court, that absent Mrs. Wied's coming forward and intervening over Valhi's fierce objection, the abandoned class claims which Mrs. Wied took up and successfully prosecuted would have remained precisely where Valhi had abandoned them. Petition at 17; A52-A53, paragraph 30. Finally, Valhi asserts it "did nothing in this case which prejudiced any economic interest of

PSA or its stockholders." Valhi's Brief at 6. In its argument, Valhi ignores as did the Trial Court the difference in millions of dollars between the market value of Valhi's PSA shares and the value of the airplanes and lease Valhi obtained in exchange for the PSA shares. Petition at 6-7. Valhi moreover does not mention the fact the Trial Court did not refer to, let alone take into account, the $8,712,000 of income from Valhi's leasing of the airplanes to PSA. *Idem* at 15. Finally, Valhi does not refer to the fact the Delaware Supreme Court never reached the profit issue because of its placing upon Mrs. Wied the burden to prove that Valhi's profit was "at the expense of, or to the prejudice of, PSA and its stockholders," thus insulating Valhi as the faithless representative from accounting for its personal profit. *Idem* at 22. Taken either separately or together, Valhi's arguments buttress the need for the review Mrs. Wied seeks and, indeed, the corrective action she deems imperative.

V.

Valhi's argument that the Delaware courts "adjudicated" the facts and thus placed them beyond the reach of the Court to do anything where the record demonstrates the factual errors of the Delaware courts in resolving the issues of notice and adequacy of representation (Valhi's Brief at 4-7) ignores the Court's holdings that where fundamental constitutional rights are at stake (e.g., due process), findings of fact by a state court are not insulated from the Court's examination. In *Craig v. Harney*, 331 U.S. 367, 373 (1947), the Court said:

> In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made.

See also Time, Incorporated v. Pape, 401 U.S. 279, 284 (1971), *reh'g denied*, 401 U.S. 1015 (1971); *Whitus v.*

State of Georgia, 385 U.S. 545, 550 (1967); *New York Times Company v. Sullivan*, 376 U.S. 254, 285 (1964); *Ker v. State of California*, 374 U.S. 23, 33-34 (1963); *Napue v. People of the State of Illinois*, 360 U.S. 264, 271-72 (1959); *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951). Specifically applicable to the present case is the principle set forth in *Sterling v. Constantin*, 287 U.S. 378, 398 (1932):

> Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right.

See also Fiske v. Kansas, 274 U.S. 380, 385-86 (1927); and *Creswill v. Grand Lodge Knights of Pythias of Georgia;* 225 U.S. 246, 261 (1912).

Whether or not Valhi was an adequate representative and whether or not Valhi gave proper notice and whether or not Valhi's acts affected the due process rights of the class members under the Fourteenth Amendment present questions which typify the intermingling of fact and law which the Court's prior cases address.

CONCLUSION

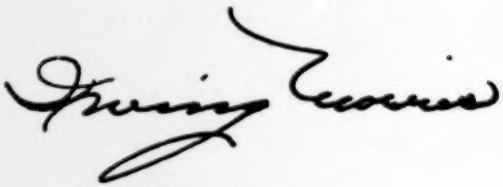
Valhi would have the Court decline to accept review of this case which presents issues going to the heart of the integrity of the prosecution of the most common form of litigation involving stockholders of public corporations in the state jurisdiction whose law affects such litigation more so than any other state jurisdiction. Valhi and the Delaware Supreme Court would leave in place a result which enables a representative plaintiff to make off with an enormous profit it negotiated to receive while serving as the representative plaintiff and at the same time agreed to cooperate to dismiss the representative litigation with prejudice. The representative plaintiff negotiated the agreement while telling the Trial Court again in an amended complaint what it told the Trial Court and the class members in its original representative complaint at the start of its representative litigation, namely, that it "will fairly and adequately protect the interests of the class."

Valhi argues that all that is involved is "a claimed failure to comply with certain procedural rules of the Delaware court system" and that the Petition "raises nothing worthy of the Court's review." Valhi's Brief at 7. Mrs. Wied respectfully suggests that the rights of public stockholders, the obligations of representative plaintiffs and the responsibility of the judiciary to monitor representative litigation — all involved in this litigation — make a compelling case for the Court's review.

So far, as Valhi notes, Mrs. Wied had lost. *Idem*. But the loss is not Mrs. Wied's alone. Without corrective action by the Court, the class members, public stockholders generally and, indeed, the judicial process join Mrs. Wied as losers, if not victims, by reason of

Valhi's actions which the Delaware Supreme Court would let stand.

Respectfully submitted,



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